

CAROL CARLTON

IBLA 90-9

Decided November 21, 1990

Appeal from a decision of the Nevada State Office, Bureau of Land Management, denying request for extension of time to make final proof for desert land entry and canceling the entry. N-22804.

Set aside and remanded.

1. Desert Land Entry: Extension of Time

An application for extension of time for submission of final proof of a desert land entry is properly rejected where there has been no showing that failure to reclaim the entry is due, without fault by the entryperson, to unavoidable delay in construction of irrigation works. An entryperson who has failed to make final proof within the 4-year period and has petitioned for an extension of time must, however, be allowed 90 days in which to submit final proof before her entry can be cancelled.

APPEARANCES: Carol Carlton, South Lake Tahoe, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Carol Carlton has appealed from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated July 25, 1990, denying her request for extension of time to make final proof for desert land entry N-22804. The same decision also cancelled the desert land entry.

Application for desert land entry N-22804 was made on March 29, 1979, for the 320 acres comprising the S½ sec. 12, T. 36 N., R. 64 E., Mount Diablo Meridian, in Elko County, Nevada. On July 9, 1985, entry was allowed, subject to proof of appropriation of sufficient water, drilling and test-flowing of wells as proposed by the entryperson, and acquisition of "legal access to the entry" in accordance with a county ordinance. Evidence that a formal right-of-access to the entry had been obtained was to be submitted before clearing the land for cultivation.

On May 26, 1989, appellant applied for an extension of time to make final proof for her desert land entry, stating:

I wish to have an extension on my property. My mother, Kaye Keller was the head pioneer in this project and she has suffered

poor health and a hardship. I am a fulltime employee and have a family with school-age children. This has been a stressfull and a total hardship on me at this time. I would deeply appreciate an extension on my parcel along with my mother.

Denying this request, BLM found that:

The statutory authority for a first extension of time to make final proof is the Act of March 28, 1908 (43 U.S.C. 333). That Act provides extensions will not be granted unless it is clearly shown that the failure to reclaim and cultivate the land within the regular four-year period was due to no fault on the part of the entryman but to some unavoidable delay in the construction of the irrigation works for which the entryman was not responsible and could not have readily foreseen.

Your request for an extension of time is hereby denied because while you relied on your mother in developing your entry, an entryperson is responsible for meeting the requirements of the Desert Land Act in developing his/her entry. Your inability to develop the entry because of family commitments is not an acceptable justification for an extension of time because the situation could have been foreseen as a problem when the entry was allowed.

(Decision at 2).

On appeal to this Board, appellant raises for the first time a contention that the failure to construct irrigation works on her entry resulted from difficulty encountered with a railroad that owns lands crossed by roads giving appellant access to her entry. She states:

We ran into an unavoidable delay in our development over the issue of proper easement to our land. We were aware of the fact that the Southern Pacific Railroad owns alternating parcels in this valley. We have been in communication with the Santa Fe Pacific Realty Corporation since fall of 1985 in order to obtain the right to access our land.

The Railroad is willing to issue us a "License to Access" * * * for roadway access across Southern Pacific Land. This license is in the form of a rental agreement on a year to year basis * * *. This agreement is unacceptable to us because the terms and fees are established, granted or denied on a yearly basis. We feel this would become a yearly battle with the Railroad having no limit to their requirements.

Final proof for the entry was due July 9, 1989. An extension of time to submit final proof is allowed by 43 U.S.C. § 333 (1988), which provides, pertinently:

[A]n entryman * * * who shall show to the satisfaction of the Secretary of the Interior * * * that he has in good faith complied with the terms, requirements, and provisions of [desert land entry requirements], but that because of some unavoidable delay in the construction of the irrigating works intended to convey water to the said land, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land * * * shall * * * be allowed an additional period of not to exceed three years * * * within which to furnish proof.

See also 43 CFR 2522.4. Further extensions, but not more than three, are available. 43 U.S.C. §§ 334, 336 (1988). Extensions are not routinely granted, and an unavoidable delay in the construction of irrigating works is the only reason for which an extension may be allowed. 43 CFR 2522.3; Charlotte Peck, 116 IBLA 169 (1990); William C. Stayt, 37 I.D. 332 (1908).

There is no indication that appellant conveyed to BLM her doubts concerning the grant proposed by the railroad, or that the access so obtained would not have satisfied BLM's requirements imposed when entry was allowed on July 9, 1985. In Charlotte Peck, 116 IBLA at 174, quoting Paul I. Kochis, A-30427 (Oct. 26, 1965), we found that an entryperson is obliged to "show that he had done all that was possible for him to do to perfect the entry during the time he held it." In Peck we found that failure to obtain financing for irrigation works did not justify an extension where there was no showing that a financing application had been rejected by a bank, because there was consequently no showing that the entrypersons did "all that was possible for them to do to perfect the entry." Id. The same standard would apply generally to this case, involving as it does an application for additional time to make final proof.

In this case, however, appellant did not raise her arguments with BLM concerning the limiting effect the railroad access proposal may have had on her development of her intended irrigation works. She was on notice from the time her entry was allowed that she was obliged to perfect a formal right-of-access acceptable to BLM before she could begin cultivation of the entry, and it is clear that the 4-year term had expired when BLM issued the decision denying an extension of time and cancelling the entry. Nonetheless, BLM was required by Departmental regulations in effect when the decision issued to allow appellant "90 days in which to submit final proof." 43 CFR 2521.6(j)(1). Under the circumstances, where the desert land regulations require such a procedure, BLM should have allowed her 90 days to submit final proof. See id. at 175. Peck, 116 IBLA at 175. Under the circumstances of this case, therefore, we find that appellant is entitled to 90 days in which to present her final proof. The 90-day period shall begin to run when this decision is received by appellant. During the 90-day period allowed, she should submit all materials necessary for making final proof of reclamation and cultivation to BLM. BLM should review all material received, and issue a new decision. Should the decision be adverse, appellant will again have a right of appeal to this Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appeal from is set aside and the case remanded for action consistent with this opinion.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge